

**A Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution
Alliance Sdn Bhd and another appeal**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL SUIT NOS J-02-765-04
OF 2012 AND J-02-730-04 OF 2012
ABDUL MALIK ISHAK, AZAHAR MOHAMED JJCA AND MAH
WENG KWAI J
16 NOVEMBER 2012

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Land Law — Sale of land — Order for — Cause to the contrary — Whether proved — Whether chargor's cause of action accrues from date of default of repayment of loan — Whether respondent was guilty of delay in commencement of foreclosure proceedings — Whether delay fell within any of three categories of cause to the contrary — Whether foreclosure actions were time barred — Whether claim for interest time barred — National Land Code s 256 — Limitation Act 1953 s 21(2) & (5)(b)

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E Mayban Finance Bhd ('MFB') had granted the appellant a housing loan, a term loan and a revolving credit facility. As security for the loans the appellant had charged his two properties to MFB. By way of a vesting order dated 17 April 2008, the appellant's accounts were vested in the respondent. Sometime in March 1996, the appellant had defaulted in the repayment of the loans and the respondent had issued letters of demand demanding repayment of the outstanding loan sums of RM910,480.14, in respect of the housing loan and of RM1,528,505.79 in respect of the term loan and revolving credit facility. On 10 May 2011, the respondent issued two Form 16D Notices ('the default notices'), pursuant to s 254 of the National Land Code ('NLC') to the appellant. As the appellant failed to remedy the breaches specified in the default notices within the 30 day statutory period, the respondent commenced foreclosure proceedings by way of two originating summonses against the appellant. The judicial commissioner ('JC') granted the orders for sale pursuant to s 256 of the NLC. These were the appellant's two appeals against the decision to grant the orders for sale. The two appeals, which involved the same parties and issues, were heard together. The appellant's grounds of appeal were namely that the respondent's failure to issue the default notices within seven days from the date of default on the loans established 'cause to the contrary' under s 256(3) of the NLC; that the cause of action in the originating summonses was time barred and that the claim for interest was time barred. The appellant submitted that the respondent by not initiating proceedings until some 15 years from the act of default was deliberately intending to exploit the circumstances of default and unjustly obtaining huge amounts of snow balling interest against the appellant. It was therefore the appellant's contention

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that the orders of sale ought not to have been granted as they would condone the respondent's wrongful acts. A

Held, dismissing the appeals with costs:

- (1) In an application for an order for sale under s 256 of the NLC, an order for sale was mandatory unless the appellant/chargor succeeded in proving that there was 'cause to the contrary'. It is settled law that in a foreclosure action the court would only be concerned with those three categories of 'cause to the contrary' as laid down by the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 (*Low Lee Lian's* case). The law is clear that the cause of action by a chargor does not accrue from the date of default of repayment of the loan but instead from the time the chargor fails to remedy the default as specified in the default notice. As such, based on the facts of the present case it could not be said that the respondent was guilty of any delay in the commencement of the foreclosure proceedings. In any event the allegation of delay was not one which fell within any of the three categories in *Low Lee Lian's* case. In the circumstances the appellant's contention that there was 'cause to the contrary' when the respondent failed to file an action against the appellant after seven days from his default on the loan was without merit (see paras 17 & 20). B C D E
- (2) The mere fact that the respondent had filed the foreclosure proceedings some 15 years after the appellant's default in repayment of the loans did not mean that the respondent deliberately intended to exploit the circumstances of default and unjustly obtain huge amounts of snowballing interest against the appellant. There was nothing to prevent the appellant from repaying the whole or any part of the loans at any time to avoid the accumulation of the 'snow balling interest'. Equity had no bearing in a case of foreclosure and it could not be said by the appellant that the orders of sale were contrary to the rule of law and equity (see para 23). F G
- (3) The cause of action in the present case accrued on 10 June 2011, upon the expiry of the 30-day notice under the default notices issued to the appellant, and not from the date of the notice of default ie 10 March 1996. Thus, the JC had correctly applied the appropriate principle of law in deciding on when limitation began to run in this case. Further, the limitation period for the respondent to claim against the appellant was 12 years pursuant to s 21(5)(b) read with s 21(2) of the Limitation Act 1953 ('the Act'). As such, the appellant's contention that the respondent's foreclosure actions were time barred was groundless (see para 24). H I
- (4) Where interest is capitalised and treated as part of the principal sum under the terms of the charge, the respondent's claim for interest was not caught by s 21(5) of the Act as it fell within the proviso of s 21(5)(b).

A Thus the claim for interest was within the limitation period of 12 years under s 21 of the Act and the appellant's reliance on the defence of limitation on the interest claimed was misplaced and had no merit in law (see paras 29–30).

B **[Bahasa Malaysia summary]**

Mayban Finance Bhd ('MFB') telah memberikan perayu pinjaman perumahan, pinjaman bertempoh, dan kemudahan pinjaman pusingan. Sebagai jaminan untuk pinjaman-pinjaman itu perayu telah mencagarkan dua hartanahnya kepada MFB. Melalui perintah yang diletak hak bertarikh 17 April 2008, akaun-akaun perayu terletak hak ke atas responden. Sekitar bulan Mac 1996, perayu telah gagal membuat bayaran balik pinjaman-pinjaman itu dan responden telah mengeluarkan surat-surat tuntutan menuntut bayaran balik jumlah pinjaman-pinjaman yang belum dijelaskan sebanyak RM910,480.14, berkaitan pinjaman perumahan dan RM1,528,505.79 berkaitan pinjaman bertempoh dan kemudahan pinjaman pusingan. Pada 10 Mei 2011, responden telah mengeluarkan dua Notis Borang 16D ('notis-notis kegagalan') menurut s 254 Kanun Tanah Negara ('KTN') kepada perayu. Oleh sebab perayu telah gagal untuk meremedikan pelanggaran-pelanggaran yang ditetapkan dalam notis-notis kegagalan itu dalam tempoh statutori 30 hari, responden telah memulakan prosiding penebusan melalui dua saman pemula terhadap perayu. Pesuruhjaya kehakiman ('PK') telah memberikan perintah-perintah untuk jualan menurut s 256 KTN. Ini adalah dua rayuan perayu terhadap keputusan memberikan perintah-perintah jualan. Dua rayuan itu, yang melibatkan pihak-pihak dan isu-isu yang sama, telah didengar bersama. Alasan-alasan rayuan perayu adalah bahawa kegagalan responden untuk mengeluarkan notis-notis keingkaran dalam masa tujuh hari dari tarikh keingkaran ke atas pinjaman-pinjaman itu membuktikan 'cause to the contrary' di bawah s 256(3) KTN; bahawa kausa tindakan dalam saman-saman pemula telah luput had masa dan bahawa tuntutan untuk faedah telah luput had masa. Perayu berhujah bahawa responden dengan tidak memulakan prosiding sehingga 15 tahun kemudian daripada tindakan keingkaran itu dengan sengaja mengeksploitasikan keadaan keingkaran itu dan secara tidak adil memperoleh jumlah besar faedah yang berganda terhadap perayu. Oleh demikian adalah hujah perayu bahawa perintah-perintah jualan itu tidak patut diberikan kerana ia seperti mempersetujui perbuatan salah responden.

Diputuskan, menolak rayuan-rayuan dengan kos:

- I (1) Dalam permohonan untuk perintah jualan di bawah s 256 KTN, suatu perintah jualan adalah mandatori kecuali perayu/penggadai berjaya membuktikan terdapat 'cause to the contrary'. Adalah undang-undang tetap bahawa dalam tindakan melelong mahkamah hanya mementingkan tiga kategori 'cause to the contrary' yang diputuskan oleh

- Mahkamah Persekutuan dalam kes *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 ('kes *Low Lee Lian*'). Undang-undang adalah jelas bahawa kausa tindakan oleh penggadai tidak terakru dari tarikh keingkaran bayaran balik pinjaman tetapi sebaliknya dari masa penggadai gagal untuk meremedikan keingkaran itu sebagaimana ditetapkan dalam notis keingkaran. Oleh itu, berdasarkan fakta kes ini ia tidak boleh dikatakan bahawa responden bersalah untuk apa-apa kelewatan memulakan prosiding melelong. Dalam apa keadaan dakwaan kelewatan tidak jatuh dalam mana-mana tiga kategori dalam kes *Low Lee Lian*. Dalam keadaan berikut hujah perayu bahawa terdapat 'cause to the contrary' apabila perayu gagal memfailkan tindakan terhadap perayu selepas tujuh hari dari keingkarannya ke atas pinjaman itu adalah tanpa merit (lihat perenggan 17 & 20). A
- (2) Hanya fakta bahawa responden telah memfailkan prosiding melelong 15 tahun kemudian selepas kegagalan perayu membuat bayaran balik pinjaman-pinjaman tidak bermakna bahawa responden dengan sengaja berniat untuk mengeksploitasikan keadaan kegagalan itu dan secara tidak adil memperoleh jumlah besar faedah berganda terhadap perayu. Tiada apa-apa yang menghalang perayu daripada membayar balik keseluruhan atau sebahagian daripada pinjaman-pinjaman itu pada bila-bila masa untuk mengelakkan pengumpulan 'snow balling interest'. Ekuiti tidak terpakai dalam kes lelongan dan ia tidak boleh dikatakan oleh perayu bahawa perintah-perintah jualan itu adalah bertentangan dengan rukun undang-undang dan ekuiti (lihat perenggan 23). B
- (3) Kausa tindakan dalam kes ini terakru pada 10 Jun 2011, selepas luput notis 30 hari di bawah notis-notis keingkaran yang dikeluarkan kepada perayu, dan bukan dari tarikh notis keingkaran iaitu 10 Mac 1996. Oleh itu PK dengan betul menggunakan prinsip undang-undang yang sesuai dalam membuat keputusan bila had masa bermula dalam kes ini. Selanjutnya, tempoh had masa untuk responden menuntut terhadap perayu adalah 12 tahun menurut s 21(5)(b) dibaca bersama s 21(2) Akta Had Masa 1953 ('Akta tersebut'). Oleh itu, hujah perayu bahawa tindakan-tindakan melelong responden telah luput had masa tidak berasas (lihat perenggan 24). C
- (4) Di mana faedah dikumpul dan dianggap sebagai sebahagian daripada jumlah prinsipal di bawah terma-terma gadaian, tuntutan untuk faedah responden tidak terangkum oleh s 21(5) Akta tersebut kerana ia terangkum dalam proviso s 21(5)(b). Oleh itu tuntutan untuk faedah adalah dalam tempoh had masa 12 tahun di bawah s 21 Akta tersebut dan kebergantungan perayu atas pembelaan had masa berhubung faedah itu telah disalahkan dan tidak mempunyai merit dari segi undang-undang (lihat perenggan 29–30).] D
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A Notes

For cases on order for sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4860–4978.

Cases referred to

- B** *Bank Pertanian Malaysia v Mohd Gazzali bin Mohd Ismail* [1996] 5 MLJ 692, HC (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, FC (refd)
Peh Lai Huat v MBf Finance Bhd [2011] 3 MLJ 470; [2009] 5 CLJ 69, CA (refd)
- C**

Legislation referred to

Limitation Act 1953 ss 6, 21, 21(1), (2), (5)(b)
National Land Code ss 254, 256, 256(3), 340, Form 16D
Rules of the High Court 1980 O 83 r 3

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Appeal from: Originating Summons Nos 24F–1749 of 2011 and 24F–1741 of 2011 (High Court, Johor Bahru)

- Radhi Azizan (Ahmad Faiz bin Munawar with him) (N Krishnan Nair & Co) for the appellant.*
Jack Yow (Joshua Lim with him) (Rahmat Lim & Partners) for the respondent.

Mah Weng Kwai J (delivering judgment of the court):**F BACKGROUND FACTS**

- G** [1] The appeals in Rayuan Sivil No J-02–730–04 Tahun 2012 ('appeal 730') and Rayuan Sivil No J-02–765–04 Tahun 2012 ('appeal 765') were taken together as they involved the same parties and issues. The grounds of appeal are similar.

- H** [2] Both appeals are against the decisions of the learned judicial commissioner who granted the orders for sale in foreclosure proceedings pursuant to s 256 of the National Land Code ('NLC').

[3] The appellant in appeal 730 was originally granted a housing loan of RM319,183 on 29 December 1994 by Mayban Finance Bhd ('MFB').

- I** [4] In appeal 765 the appellant was granted a term loan amounting to RM300,000 and a revolving credit facility amounting to RM200,000.

[5] As security for the loans, the appellant charged two properties to MFB which are the subject matter in the foreclosure proceedings.

[6] By a vesting order dated 17 August 2004 the assets, rights and powers of MFB were vested in Malayan Banking Bhd ('MBB'). Thereafter, by another vesting order dated 17 April 2008, the appellant's accounts with MBB were vested in the respondent. **A**

[7] The appellant defaulted in the repayment of the loans sometime in March 1996. **B**

[8] The solicitors for the respondent issued letters of demand dated 28 April 2011 demanding payment of the outstanding sums of RM910,480.14 as at 27 April 2011 in respect of appeal 730 and of RM1,528,505.79 as at 27 April 2011 in respect of appeal 765. **C**

[9] The respondent's solicitors subsequently issued notices of default with respect to a charge in Form 16D NLC dated 10 May 2011 in both cases pursuant to s 254 of the NLC to the appellant. As the appellant failed to remedy the breaches specified in the Form 16D notices within the 30 day statutory period, the respondent filed the originating summonses for foreclosure on 28 June 2011. **D**

[10] The learned judicial commissioner granted the orders for sale on 16 February 2012. **E**

THE APPELLANT'S GROUNDS OF APPEAL

[11] In his memorandum of appeal, the appellant relied on four grounds namely: **F**

- (a) as the respondent had delayed in the commencement of the proceedings by failing to issue the Form 16D Notice seven days from the date of default of the said loans by the appellant, there is 'cause to the contrary' under s 256(3) of the NLC; **G**
- (b) the cause of action in the originating summonses is time barred;
- (c) the claim for interest by the respondent is time barred; and **H**
- (d) the respondent's claim is barred by res judicata.

[12] At the hearing of the appeals the appellant abandoned ground number (d). **I**

DECISION OF THE COURT

[13] Upon reading the record of appeal, the written submissions of counsel

A for the appellant and the respondent and upon hearing counsel aforesaid, the court unanimously held that there was no merit in the appellant's contentions and dismissed the appeals with costs and affirmed the decisions of the learned judicial commissioner.

B GROUNDS OF DECISION

C [14] In essence, the appellant complained that the respondent had 'premeditated to unjustly exploit interest claims' by delaying the commencement of the foreclosure proceedings. Counsel for the appellant submitted that the respondent who was aware of the default in repayment of the said loans since sometime in March 1996 chose to 'sleep over its right' and did not initiate proceedings until some 15 years later. Counsel for the appellant further submitted that 'the act of the respondent in sleeping on its right, despite being aware of the default by the appellant is clearly by design/premeditation to exploit the circumstances of default and (to) 'unjustly' obtain huge snow balling interest claim against the appellant' and as such the orders of sale ought not to have been granted as it was unjust to do so and that the orders would condone the respondent's wrongful acts.

E [15] In response counsel for the respondent submitted that the respondent's cause of action as the chargee only accrued upon the appellant's failure to remedy the default specified in the Form 16D Notice (see the Court of Appeal decision in *Peh Lai Huat v MBf Finance Bhd* [2011] 3 MLJ 470; [2009] 5 CLJ 69) and that since the limitation period of 12 years under s 21 of the Limitation Act 1953 is applicable to foreclosures, the respondent was well within time to commence the foreclosure proceedings. Further the respondent's claim for interest is within the limitation period as the interest has been capitalised and allowed under s 21(5)(b) of the Limitation Act 1953.

G [16] It was not disputed by the appellant that the formalities under s 256 of the NLC had been complied with namely:

- (a) the issuance of Form 16D Notice to the appellant; and
- H (b) the setting out of the particulars of the amounts outstanding as required under O 83 r 3 of the Rules of the High Court 1980.

FORECLOSURE UNDER S 256 OF THE NLC

I [17] In an application for an order for sale under s 256 of the NLC, unless the court is satisfied of the existence of 'cause to the contrary' an order for sale is mandatory. The burden of proving that there is cause to the contrary lies on the appellant.

The Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 went on to explain that ‘cause to the contrary’ may be established only in three categories of cases where:

- (a) a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the NLC establishes cause to the contrary;
- (b) the chargor may show cause to the contrary within s 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; or
- (c) a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity.

The Federal Court went on to state at p 87 that:

As earlier observed, unless a chargor can bring himself within one of the three categories of cases set out earlier in this judgment, no cause to the contrary would be shown and the court will be obliged to make an order for sale. It would not be sufficient, as was done in the instant case, to allege mere breaches by the chargee of the loan agreement between the chargee and the borrower or even of the terms of the annexure to the charge in order to resist an application under s 256(3) of the Code.

[18] The court is of the view that unlike a civil claim for the recovery of damages arising from a breach of contract which is a suit in personam, a common law action, a foreclosure action is an action in rem being a statutory action under the NLC. The distinction between an action in personam and an action in rem is important as it will determine whether and when the cause of action has arisen and whether the limitation period to apply will be governed under the provisions of ss 6 or 21 of the Limitation Act 1953.

[19] In a foreclosure action, claims of, inter alia, alleged breaches of contractual obligations or challenges on the calculation of interest under the loan agreement are not relevant. The court will only be concerned with the restrictive categories of ‘cause to the contrary’ as laid down in the case of *Low Lee Lian*. The alleged breaches and challenges are matters to be raised by the appellant in a separate civil suit.

[20] The court holds that the appellant’s contention that there is ‘cause to the contrary’ when the respondent failed to file an action against the appellant after seven days from his default on the loan, to be without merit. The law is clear that the cause of action by a chargor does not accrue from the date of default of repayment of the loan but instead from the time the chargor fails to remedy the default as specified in the Form 16D Notice.

A In *Peh Lai Huat v MBf Finance Bhd* [2011] 3 MLJ 470; [2009] CLJ 69 the Court of Appeal stated at p 473 (MLJ); p 73 (CLJ) that:

... the right to exercise the statutory remedy of an order for sale did not arise until after the appellant had failed to remedy the default specified in the Form 16D notice.

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[21] *Peh Lai Huat*, a decision of the Court of Appeal has not been reversed by the Federal Court and thus remains good law. There is also no conflicting decision of the Court of Appeal which is inconsistent with *Peh Lai Huat*.

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[22] In the present case the Form 16D Notice was issued by the respondent on 10 May 2011. The 30 day period to remedy the breach expired on 10 June 2011 and the respondent filed the originating summons on 28 June 11, that is 18 days after the event of default. Surely, it cannot be gainsaid that the respondent is guilty of untimely or contumelious or of any delay in the commencement of the foreclosure proceedings. In any event the allegation of delay is not one which falls within any of the three categories illustrated in *Low Lee Lian*.

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[23] The mere fact that the respondent had filed the foreclosure proceedings some 15 years after the appellant had defaulted in the repayment of the loans in March 1996, does not mean that the respondent had deliberately delayed the commencement of proceedings to 'exploit the circumstances of default and unjustly obtain huge snow balling interest claims against the appellant' as contended by counsel for the appellant. There was nothing to prevent or restrain the appellant from repaying the whole or any part of the loans at any time to avoid the accumulation of the 'snow balling interest'. The accumulation of interest was well within the knowledge of the appellant and cannot lie in the mouth of the appellant to now complain that the respondent was exploiting the situation or delaying by design to earn interest from the appellant! It is not wrong for banks to claim for interest when it is their business to do so. Equity has no bearing in a case of foreclosure and thus it cannot be said by the appellant that the orders of sale were contrary to 'the rule of law and equity'.

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THE ORIGINATING SUMMONSES ARE NOT TIME BARRED

I [24] The appellant's contention that the respondent's foreclosure actions are time barred is groundless. The cause of action accrued on 10 June 2011 (upon the expiry of the 30 day notice under the Form 16D Notice) and not from the notice of default dated 10 March 1996. The learned judicial commissioner had correctly applied the principle in *Peh Lai Huat* when deciding on when

limitation began to run in this case. The limitation period for the respondent to claim against the appellant is 12 years pursuant to s 21(5)(b) read with s 21(2) of the Limitation Act 1953.

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[25] Counsel for the appellant referred to a term in the charge annexure that stated 'in the event of Default, upon the expiry of 7 days, MFB is to exercise their statutory rights under the NLC and exercise their powers upon default herein under this Charge and by law provided without any previous notice to or concurrence on the part of the Chargor'. What this simply means is that the charge annexure only permits the chargee to commence to exercise its rights under the NLC after seven days from the date of default. It does not restrict the chargee's right to file an action to enforce that right within the 12 year limitation period.

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CLAIM FOR INTEREST IS NOT TIME BARRED

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[26] Clause 3(5) of the charge annexure provides that:

... no part of any instalments to be paid by the chargors as hereinbefore provided or any other payments which the chargors may make to the lender shall be deemed to be a repayment of principal until all interest due or deemed to be due to the lender has been paid.

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and cl 3(8)(a) in appeal 730, which is *pari materia* with s 6.04 in appeal 765, states that:

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... interest on any principal moneys for the time being hereby secured including capitalized interest may at the lender's absolute discretion at the end of each calendar month be capitalised and added for all purposes to the principal sum then owing ...

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[27] In view of the above, where interest is capitalised and treated as part of the principal sum under the terms of the charge, the respondent's claim for interest is not caught by s 21(5) of the Limitation Act 1953 as it falls within the proviso of s 21(5)(b). Thus the claim for interest is within the limitation period of 12 years under s 21 of the Limitation Act 1953.

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[28] A similar issue was considered by Her Ladyship Justice Zaleha Zahari JC (now FCJ) in *Bank Pertanian Malaysia v Mohd Gazzali bin Mohd Ismail* [1996] 5 MLJ 692 where Her Ladyship said at p 703 of the report:

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It would therefore appear that the charge comprises future interest and by the express mention of the word 'faedah' (interest) in the charge in the form prescribed for payment of a 'principal' sum, interest was to be treated as part of the principal sum secured by the charge. There was furthermore the express provision of cl 10(c)

A of the charge annexure which provided that no payment made by the chargor shall be treated as repayment of principal until all interest due or deemed to be due or accrued has been paid.

B In these circumstances I hold that there were provisions in the charge and charge annexure whereby arrears of interest has to be treated as part of the principal sum of money secured by the charge and that interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued. In my judgment proviso (b) to s 21(5) of the LA 1953 applies and that the period applicable in this case is 12 years and not six years.

C [29] Counsel for the appellant in his oral submissions contended that 'interest can be capitalised but the interest must be kept separate from capital'. After much thought we must confess that we cannot fathom what counsel really meant by that statement.

D [30] If interest can be capitalised then it forms part of the principal or capital sum and the limitation period applicable will be 12 years and no less. The six year limitation period does not apply in a claim for interest as it is not a claim in personam.

E [31] In view of the above, the court holds that the appellant's reliance on the defence of limitation (on the interest) claim is misplaced and has no merit in law.

CONCLUSION

F [32] The court is of the view and holds that:

G (a) the allegation of delay in the commencement of the foreclosure proceedings by the respondent did not amount to 'cause to the contrary' within the meaning of s 256(3) of the NLC;

(b) the cause of action in the originating summonses was not time barred as the summonses had been duly filed within the applicable limitation period of 12 years under s 21(1) of the Limitation Act 1953; and

H (c) the claim for interest was also not time barred.

[33] In the result the appeals were dismissed with costs of RM10,000.
Appeals dismissed with costs.

I Reported by Kohila Nesan